I find that this section applies in respect of the goods of GPTI seized by the first defendant pursuant to s. 30(1) of the Sales Tax Act. Under this section the proceeds of sale of the goods must first be applied to pay towards the payment of the EPF contributions for twelve months.

For the reasons stated above I granted the declarations No. 1, 2, and 3 in the affirmative. For declaration No. 4, I gave the following directions:

(1) The goods seized under s. 30 of the Sales Tax Act do not come within the items forming part of property subject to the floating charges.
(2) In respect of the other goods the EPF contributions rank in priority to the sales tax and the customs duties which between them rank equally.
(3) In respect of goods which have been seized under s. 30 of the Sales Tax Act the first defendant is entitled to proceed with the sale in accordance with the provision of the said section. But since s. 66 of the Employees Provident Fund Act 1991 has application, from the proceeds of sale payment must be made for the amount due in respect of EPF contributions payable by GPTI for twelve months if still outstanding after the EPF has been paid from the proceeds of sale of the other goods.

I also directed that the costs of this application be paid from the assets of GPTI prior to the payments to be made.

KOH YING HUAT

v.

KOH KAH HING SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI J.
[ORIGINATING PETITION NO. D5-26-30 OF 1990]
6 AUGUST 1992

COMPANY LAW: Section 181 Companies Act 1965 - Petitioner seeking declarations that defendant company belongs to the family and that the petitioner and his brothers are entitled to 25% equity of the company - Purchase of land financed by petitioner's mother - Land registered in name of eldest son and his wives - Defendant company formed - Land sold to defendant - Allegation that eldest son had agreed to distribute company's shares to his brothers - No distribution - Whether company formed was a family company - Whether land purchased by company was for the family.

TRUST: Purchase of land financed by petitioner's mother - Land registered in name of eldest son and his wives - Family members occupying land - Whether eldest son holding land in trust for family - Trust defined - Whether in the context of old Chinese traditional family practice it was appropriate to apply a presumption of advancement in favour of the eldest son.

PRACTICE & PROCEDURE: Application by petitioner for declarations pursuant to s. 181 of the Companies Act 1965 - Claim for shares purportedly held in trust by eldest son - Whether procedure adopted correct - Whether petitioner has the locus standi to claim on behalf of other beneficiaries - Whether action barred by limitation - Order 2(3), O. 88 r. 5(2), O. 92 r. 4 RHC - Section 22 Limitation Act 1953.

This was a petition pursuant to s. 181 of the Companies Act 1965 for declarations that the defendant company belonged to the Koh family, that the petitioner and his brothers were entitled to 25% equity of the company and that the shares held by Koh Chong Huat (KCH), the eldest son, or KCH's son be held in trust for them in equal shares.

The petitioner's mother financed the purchase of a piece of land which was registered in the name of KCH and his two wives. On 19 October 1981 the defendant company was formed with KCH, his son and the petitioner as shareholders and on 1 June 1982 the land was sold to the defendant. It was the petitioner's contention

that the co-owners of the land held the land on trust for the Koh family which trust was created when the land was purchased with their mother's money. He also contended that the intention behind the incorporation of the defendant company was to form a family company. Furthermore, the petitioner alleged that KCH had orally agreed to distribute the company's shares to the 4 brothers but until the time of KCH's death the distribution was not carried out. The defendant objected to the procedure adopted by the applicant and contended that the petitioner lacked the *locus standi* to claim on behalf of the other beneficiaries. The defendant also claimed that the petitioner was barred by limitation from bringing the present action.

Held:

[1] The Court found no merit in the argument of the defendant that the petitioner had commenced the proceedings wrongly. The petitioner had begun by way of petition pursuant to O. 88 r. 5(2) of the Rules of the High Court 1980 (RHC) requiring that applications for relief in cases of oppression, must be begun by petition. In any event O. 2(3) RHC prevents the process being set aside just because a wrong process had been adopted and O. 92 r. 4 RHC gives the Court power to do acts to prevent injustice and give the relief prayed for under s. 181(2) of the Companies Act 1965.

[2] On the issue that the petitioner lacked the *locus standi* to claim for the other beneficiaries, the Court held that it was in order for the petitioner as one of the beneficiaries to make a claim for the other beneficiaries.

[3] Section 22 of the Limitation Act excludes the provision regarding limitation if the petitioner can prove that he is a beneficiary and can prove a trust. The Court accepted the evidence of the petitioner and his witnesses that the land was purchased with the money given by the petitioner's mother and that the land was for the family. Although the land was originally in KCH's name the fact that family members were living on the land was ample proof that the land did not belong to KCH, though registered so. The Court also accepted the evidence of the petitioner which was corroborated that KCH did promise he would give the shares of the company to the petitioner and the other brothers. It was a fact that the company was formed not to perform any business but to hold the shares in the land.

[4] The Court found merit in the argument of Counsel for the petitioner that the Court should look at the whole of the evidence from the context of the family being an old Chinese traditional family and in a situation where the father was mentally sick, the task of running the family business fell on the shoulders of the eldest son, KCH. Thus, adopting the case of *Neo Tai Kim v Foo Stie Wah* 4 PCC 405, it was inappropriate to apply the presumption of advancement in favour of KCH as the circumstances in which KCH held the land militated against that interpretation.

[5] The petitioner succeeded in his petition. The land was held in trust by KCH for the Koh family and the company that was incorporated through KCH's efforts, and their shares held in whatever denomination belonged to the Koh family and was held by the defendant for them.

[Petition allowed with liberty to petitioner to apply for consequential orders and costs].

Cases referred to:

Yong Nyee Fan & Sons Sdn. Bhd. v. Kim Guan & Co. Sdn. Bhd. [1979] 1 MLJ 182 @ 188 ***(refd)***

Lee Phek Choo v. Ang Guan Yau & Anor. [1975] 2 MLJ 146 ***(dist)***

Neo Tai Kim v. Foo Stie Wah 4 PCC 405 ***(foll)***

Legislation referred to:

Companies Act 1965, s. 181(2)

Limitation Act 1953, s. 22

Rules of the High Court 1980, O. 2(3), O. 88 r. 5(2), O. 92 r. 4

For the petitioner- Chandran G. Nair; M/s. Thevin, Chandran & Wong

For the respondent- Tee Tek Yek; M/s. Tee, Tan & Partners

JUDGMENT

Hj. Abu Mansor bin Ali J:

In his petition dated 9 October 1990, filed under s. 181 Companies Act 1965, the petitioner prays for declarations that Syarikat Koh Kah Hing Sdn. Bhd. belongs to the family and that the petitioner, Koh Chong Huat, Koh Eng Huat and Koh Thiam Huat, the brothers are entitled to 25% equity of the company. The petitioner also prays that the shares held by Koh Chong Huat/ Koh Teck Fei be declared to be held in trust for them in equal shares. Apart from these the petitioner prays for several injunctions in aid and costs.

The facts of this case are as follows. The plaintiff Koh Ying Huat (KYH) is the 3rd son of deceased Koh Kah Hing (KKH). It is the case of the plaintiff and whom he represented that his mother (wife of KKH) had put out a sum of money in order to buy a piece of land, the subject of dispute between the members of plaintiff's family and the defendant. The said land was also used by Koh Chong Huat (KCH), the brother of the plaintiff (KYH) for the purpose of oil palm factory. It was also an undeniable fact that $^1/_3$ of the said land was registered in Koh Chong Huat's name and followed by Yap Ngit Keong (YNK) ($^1/_6$ bahagian) and Goh Gin Moi (GGM) ($^1/_6$ bahagian). What the plaintiff is trying to put forward is that even though the said land is so registered in the present co-owners it is the plaintiff's case that the present co-owners held the said land in trust for the Koh family and further it is also plaintiff's contention that the trust was so created when the land was bought since it was financed by the money given by the wife of Koh Kah Hing, their mother.

The plaintiff further says the defendant company Syarikat Koh Kah Hing Sdn.Bhd. (the said company) incorporated on 19 October 1981 had three shareholders, Koh Chong Huat, Koh Teck Fei and plaintiff. The intention behind the incorporation of the company was to form a family company.

Then on 1 June 1982 a sale and purchase agreement (agreement) between Koh Chong Huat, as land owner and the company as a purchaser was prepared. It was the contention of the plaintiff that the sale was to facilitate the company holding shares in trust for the Koh family. The plaintiff alleged that Koh Chong Huat had agreed orally to distribute the company's shares to the 4 brothers of Koh. It is plaintiff's case that Koh Chong Huat had held several meetings with the brothers regarding the company's shares' distribution but up to the date of Koh Chong Huat's death the distribution of the shares were never carried out.

The issue that this Court must resolve is whether it is reasonably true that the deceased Koh Chong Huat was holding the said land in trust and whether the company formed was a family company and whether the purchase of the said land by the company was for the family? In *Yong Nyee Fan & Sons Sdn. Bhd. v. Kim Guan & Co. Sdn. Bhd.* [1979] 1 MLJ 182 @ 188 Hashim Yeop A. Sani J. (as he then was) of trust said:

> It has been found difficult to give a satisfactory definition of a trust but it has been accepted that the most satisfactory definition is by Professor Keeton which definition is that a trust is the relationship which arises wherever a person called the trustee is compelled in equity to hold property, real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.

In that case it seems obvious in going through the evidence of the various witnesses it is really a matter of credibility. In the same case cited Chang Min Tat FJ said:

> The authorities establish that though the case for the claimants of a trust against a dead man needs no corroboration, it must be approached with suspicion.

However, in the event that the Court can find, on the evidence, that there is a trust, then the Court has to make the declaration prayed for and to give the required direction to give effect to the declared trust.

Before considering any evidence whether there exist a trust or not it is required of me to find if this procedure adopted by the applicant is correct as the matter has been objected to by the defendant. I find no merit in the argument of the defendant that the plaintiff had commenced the proceedings wrongly.

The plaintiff has begun by way of petition, in accordance with O. 88 r. 5(2) of the High Court Rules 1980, requiring that application for reliefs in cases of oppression, must be begun by petition. In any event O. 2(3) thereof prevents the process being set aside just because a wrong process had been adopted and O. 92 r. 4 High Court Rules gives the Court power to do acts to prevent any injustice and can give the relief prayed for under s. 181(2) of the Companies Act.

On the issue that the present plaintiff lacked the *locus standi* to claim for the other beneficiaries, the defendant's Counsel cited the case of *Lee Phek Choo v. Ang Guan Yau & Anor.* [1975] 2 MLJ 146 where the applicant herself was not a beneficiary. "Walhal pemohon adalah seorang beneficiary menuntut untuk atau bagi pihak beneficiary abangnya dan adik-beradik" which I hold to be in order.

After that the defendant also raised that the claim of the plaintiff is defeated by limitation under the Limitation Act. Section 22 of the

Limitation Act excludes the provision regarding limitation, if the petitioner can prove that he is a beneficiary and can prove a trust, the period of limitation is excluded.

Turning to the evidence in this petition, I believe and accept the evidence of the petitioner and his witnesses that the said land was purchased by the money given by the petitioner's mother and the land was for the family. The truth of this is reflected in what transpired thereafter. Although the land was originally put in the deceased's name but the members of the family are allowed to use it. Even up to the date of hearing evidence was given that some members of the family were still staying on that family land. This single fact that family members were living on that land was ample proof to the Court that the land did not belong to the deceased, though registered so.

Further I believe and accept the evidence of the plaintiff, which is corroborated that the deceased Koh Chong Huat did promise that he would give the shares of the defendant to the plaintiff and the other brothers.

The reason why the land was registered in Koh Chong Huat's name was he was the eldest of the brothers and was entrusted to take care of the family's business, when the father was unwell and was unable to manage the family business.

Although the land was at first registered in the name of Koh Chong Huat later both wives of Koh Chong Huat were made co-owners. A portion of the land was also given to Tan Kok Cheng to settle a debt owed to Tan and in 1964 Tan re-transferred the 1/6th share to Koh Chong Huat and finally the share was transferred into the defendant's name.

It was a fact that the company was formed not to perform any business but to hold the $^1/_6$ share in the land. It was in evidence that Koh Chong Huat did tell the plaintiff and the brothers that he would give their shares in the defendant's company to them one day.

The evidence of the defence was one of denial. The defence called the first wife of Koh Chong Huat who testified that it is not true that the money to purchase the said land was given by Koh Chong Huat's mother. She testified it was bought with Koh Chong Huat's own money. She admitted that some money did come from the mother of Koh Chong Huat but that was used to build the factory. Then the defence called Koh Teck Fei who was the son of Koh Chong Huat who officiated as the secretary of the company. He denied that the property was trust property belonging to the family and he denied there was ever a meeting held where Koh Chong Huat promised he would give the company's shares to the plaintiff.

I find merit in the argument of Counsel for the plaintiff that the Court should look at the whole of the evidence from the context of the family being an old Chinese traditional family. That being the case in the situation where the father was mentally sick and therefore the task of running the family business fell on the shoulders of the eldest son Koh Chong Huat. I accept this argument and in this way the deceased Koh Chong Huat had to account all the receipts to the mother and it was therefore consistent that the mother puts out the money to buy the land. I also adopted the case of *Neo Tai Kim v. Foo Stie Wah* 4 PCC 405 where in an appropriate case, looking at the evidence as a whole, the Privy Council approved of the Judges viewing the case, in the context of an old Chinese traditional family practice, held that it was inappropriate to apply a presumption of advancement to such a case. Similarly, applying this case, I hold that it is inappropriate to apply the presumption of advancement in favour of Koh Chong Huat. The circumstances in which Koh Chong Huat held the land militate against that interpretation.

Finally in my view in this particular case, the evidence of a close family friend, neutral to both sides, Lim Guan Swee (SP5), aged 74 whom the Court regarded as the trustworthy witness who even had helped the family in their business by managing the family hotel Hong Chew Hotel. SP.5 confirms in close detail how this family business was conducted while the father was not well. He confirms that the land was bought with the money given by the mother of the plaintiff to the amount of RM12,000. I accept the evidence of SP5 that the said land was held in the name of Koh Chong Huat and his first and second wife in trust for the Koh family and later it was registerd in the name of the defendant. I also agree with the argument of the plaintiff in the granting of this order no re-transfer of this land is involved. The shares of the plaintiff and the other beneficiary will be reflected in the shares of the defendant. I also hold there has been no acquiescence by the plaintiff and the other beneficiary who was a minor when the land was bought and held by their deceased Koh

Chong Huat. It would be said he was a giant so to speak, in the family hierarchy and it could not be expected of them to challenge the authority of the eldest son in family matters.

Finally having regard to all the evidence, on the balance of probabilities, I find that the petitioner has succeeded in his petition and I duly hold that the land was held in trust by Koh Chong Huat for the Koh family and the company that was incorporated through Koh Chong Huat's efforts and their shares held in whatever denominations belong to the Koh family and held by the defendant for them.

I make an order in the terms what was prayed in this petition with liberty to petitioner to further apply for consequential orders with costs to the petitioner.

KWONG YIK BANK BERHAD

v.

SA'ADIAH BINTI MASTAN

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SHAIK DAUD BIN HJ.
MOHD ISMAIL J.
[CIVIL SUIT NO: D1-23-C847-86]
8 DECEMBER 1992

PRACTICE & PROCEDURE: Appeal - 3rd defendant's application to set aside judgment in default allowed by SAR - 3rd defendant guarantor for facilities granted to 1st defendant - Contention that facilities cancelled and superceded by new facilities - At time of new offer 3rd defendant no longer director of 1st defendant - Question of 3rd defendant's liability on the guarantee - Whether any defence on the merits.

PRACTICE & PROCEDURE: 3rd defendant's first application to set aside judgment in default before another Court unsuccessful - 3rd defendant making second application to set aside judgment in default - Whether permissible.

This was an appeal by the plaintiff from the decision of the learned Senior Assistant Registrar (SAR) allowing the application of the 3rd defendant to set aside a judgment in default entered against her.

The plaintiff's claim was based on facilities granted to the 1st defendant *vide* letter of offer dated 10 November 1983 which the 3rd defendant, as one of the directors of the 1st defendant, guaranteed. The 3rd defendant contended that the original facilities were subsequently cancelled and superceded by new facilities *vide* letter of offer 8 March 1985 at which time she had already effectively resigned as a director of the 1st defendant. The plaintiff contended that the second offer had nothing to do with the 3rd defendant and further that the 3rd defendant's application should not be litigated as it had been argued four years ago when she unsuccessfully applied to have the judgment set aside before another High Court.

Held:

[1] The plaintiff's contention that the second offer had nothing to do with the 3rd defendant could not be a valid contention especially when the new offer contained an express condition that "a joint and several guarantee of all the directors be taken". It was not denied that by